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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 726

JOHN M. SHUBIN and PORTER S. SHUBIN,

Petitioners,

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,

Respondent,

THE HONORABLE WILLIAM M. BYRNE, Judge of the United States District Court for the Southern District of California, Central Division,

Respondent,

and

S. VINCEN BOWLES, INC.,

Respondent.

Motion for Leave to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

and

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

JOHN M. SHUBIN and PETER S. SHUBIN,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,

Respondent,

THE HONORABLE WILLIAM M. BYRNE, Judge of the United States District Court for the Southern District of California, Central Division,

Respondent,

and

S. VINCEN BOWLES, INC.,

Respondent.

Motion for Leave to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

John M. Shubin and Peter S. Shubin, individuals, respectfully file this motion for leave to file with this Honorable Court their petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: February 13, 1962.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,
Attorney for Petitioners John M. Shubin and Peter S. Shubin.

IN THE

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OCTOBER TERM, 1960

No. .....

JOHN M. SHUBIN and PETER S. SHUBIN,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,
Respondent.

THE HONORABLE WILLIAM M. BYRNE, Judge of the United States District Court for the Southern District of California, Central Division,
Respondent,

and

S. VINCEN BOWLES, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

John M. Shubin and Peter S. Shubin respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, dated and entered December 29, 1961, denying to petitioners the righ to a jury trial.

Opinions Below.

The District Court did not write an opinion but its order granting the plaintiff's motion to strike defendants' demand for a jury trial was filed September 25, 1961, and is found at Appendix pages 56, 57 of the Petition for Writ of Mandamus to the Court of Appeals.

The opinion of the Court of Appeals (Appx. 1-3) is reported at ..... F. 2d ....., 132 U. S. P. Q. 122.

Jurisdiction.

The District Court had jurisdiction under the patent laws of the United States and more particularly under 35 U. S. C. 281; under 28 U. S. C. 1338(a), 2201 and 2202.

The jurisdiction of the Court of Appeals was invoked under the provisions of 28 U. S. C. A. 1651(a) as approved in *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, and in *Beacon Theatres v. Westover et al.* (U. S. Sup. Ct. 1959), 359 U. S. 500, 79 S. Ct. 948.

The order of the Court of Appeals (Pet. for Mandamus, App. pp. 64-66) denying the Petition for Writ of Mandamus or for other Writ or Relief was dated and entered on December 29, 1961.

Petitioners' Request for Rehearing was duly filed and was denied January 17, 1962 (Pet. for Mandamus, App. pp. 67-80).

There has been no order granting an extension of time within which to petition for certiorari and none has been requested.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254(1) and on the ground that the United States Court of Appeals for the Ninth Circuit by its order affirming the order of the District Court effectively denying petitioners the right to a jury trial has decided an important question of federal law which has not been, but should be, settled by this Court, which decision is in direct conflict with an applicable decision of the United States Court of Appeals for the Fifth Circuit involving the same basic principle of law.

The Questions Presented.

The basic questions raised are as follows:

1. Is a party entitled to a jury trial in the United States District Court in an action in which the complaint and answer raise only jury issues, but a counterclaim raising the same issues seeks equitable relief?

2. Have the District Court and the Court of Appeals followed the law as established by this Court in *Beacon Theatres, Inc. v. The Honorable Harry C. Westover, Judge of the United States District Court of the Southern District of California, Central Division, et al.* (S. Ct. 1959), 359 U. S. 500, 79 S. Ct. 948, in denying petitioners' right to a jury trial as to the issues of an original complaint and answer because combined with a counterclaim seeking equitable relief?

3. Whether the decision of the Court of Appeals in this case is not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corporation, et al.* (decided September 15, 1961), 294 F. 2d 486, 131 U. S. P. Q. 1.

4. Does the District Court violate judicial discretion and deprive petitioners of due process of law by (1) refusing to grant leave to file an amended counterclaim which eliminates prayers for equitable relief in the absence of irreparable harm and the presence of adequate legal remedy, and (2) using the presence of these prayers for equitable relief to justify the striking of a demand for jury trial?

Constitutional Provisions, Statutes and Rules Involved.

The following Constitutional Provisions, Statutes and Rules are involved:

United States Constitution, Amendment 7;

28 U. S. C. 1338(a), 2201;

28 U. S. C. 2072;

Rules 1, 2, 13, 18, 38, 39(a), 57 of the Federal Rules of Civil Procedure;

Rule 15 of the Federal Rules of Civil Procedure.

Statement of the Case.

John M. Shubin and Peter S. Shubin, petitioners here and defendants-counterclaimants in the District Court, hereinafter called Shubins, are the owners of United States Letters Patent 2,961,105 directed to a rubbish truck incorporating novel loading mechanism. Respondent S. Vincen Bowles, Inc., plaintiff in the District Court, hereinafter called Bowles, prior to the filing of the complaint made and sold trucks which were viewed by Shubins to comprise infringements. Notification of infringement was given. Without waiting to be sued, Bowles filed a complaint (Pet. for Mandamus, App. p. 3) seeking declaratory relief.

The complaint set forth the alleged controversy between the parties, alleged that the respondent did not infringe, that the patent was invalid, and sought declaratory relief in the form of a judgment that the patent was invalid and unenforceable and that the respondent did not infringe.

By their answer (Pet. for Mandamus, App. p. 11) Shubins only denied the allegations of the complaint, raised no new issues and prayed that the complaint be

dismissed, for costs, and for reasonable attorneys fees. A jury trial was demanded.

It was not known at the time the answer was filed that Bowles was discontinuing infringement and a counterclaim (Pet. for Mandamus, App. p. 12) was filed with the answer alleging infringement, praying for an injunction, for an accounting, and for treble damages.

The Bowles reply (Pet. for Mandamus, App. p. 13) to the counterclaim alleged that Shubins should take nothing thereby.

By the original complaint and answer the issues of validity and patent infringement were raised and were proper for a jury trial. A jury was demanded. By the compulsory counterclaim filed concurrently with the answer, and by the reply thereto, the same issues of patent validity and infringement were raised. Equitable relief was sought by the counterclaim.

Bowles, in an effort to avoid a jury trial upon the jury issues raised by the complaint and by the answer, moved (Pet. for Mandamus, App. p. 22) to strike Shubins' demand for jury trial.

Shubins, having learned that Bowles had discontinued infringing and had not sold any infringing devices since the institution of suit, recognized that an accounting was not necessary and that an injunction also would be unnecessary.

Accordingly, Shubins for purposes of simplifying the suit and also to eliminate any contention that the demand for a jury trial upon the issues raised by the complaint and the answer should not be recognized, moved the court by their "Motion for Leave to File Amended Counterclaim" (Pet. for Mandamus,

App. p. 38) for leave to file an amended counterclaim only.

No permission to amend the answer was requested and no amendment thereto was made.

With their motion for leave to file an amended counterclaim, the Shubins filed a clean copy of the original answer with the proposed amended counterclaim. The original answer (Pet. for Mandamus, App. p. 11) and the retyping thereof (Pet. for Mandamus, App. p. 35) are identical, word for word. The original answer and the answer as retyped are arranged in side-by-side relationship at Appendix pages 12-13 of this Petition for ease of comparison. The proposed amended counterclaim eliminated all prayers for equitable relief.

The District Court heard the Shubin Motion for Leave to File Amended Counterclaim and the Bowles Motion to Strike Demand for Jury Trial on July 27, 1961, denying the former and granting the latter (Pet. for Mandamus, App. p. 56).

Shubins, believing they were being forced to seek relief they did not need or want, and that they were being wrongfully denied a jury trial on the issues raised by the original complaint and answer, petitioned the Court of Appeals for the Ninth Circuit. That petition, copies of which are now on file with this Court, sought the issuance of an order vacating the District Court order of July 27, 1961, and such other and further relief as to the court appeared proper.

The Court of Appeals denied the petition, its order appearing at Appendix pages 1-3 and at pages 64 to 66 of the Appendix to the Petition for Mandamus.

The Shubin request for rehearing was denied on January 11, 1962 (Pet. for Mandamus, App. p. 81).

Summary of Argument.

1. The right to trial by jury is to be denied only under "imperative circumstances" not found in the present case.

2. The issues of validity and of infringement are jury issues.

3. The denial by the District Court of the Shubins' right to a jury trial was error under the law as laid down in *Beacon Theatres, Inc., Petitioner, v. The Hon. Harry C. Westover, Judge of the United States District Court of the Southern District of California, Central Division* (U. S. Supreme Court, 1959), 359 U. S. 500, 79 S. Ct. 948.

4. The decision of the Court of Appeals conflicts with the *Thermo Stitch* case of the Fifth Circuit, *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corporation, et al.* (C. A. 5, 1961), 294 F. 2d 486, 131 U. S. P. Q. 1.

5. In the federal courts equity acts only when legal remedies are inadequate and for the court to insist that equitable remedies be sought when not needed for the purpose of supporting a dismissal of a timely demand for a jury trial is an abuse of judicial discretion.

ARGUMENT.

The Right to Trial by Jury Should Be Denied Only Under "Imperative Circumstances."

Rule 1 of the Federal Rules of Civil Procedure (App. p. 4) provides that the rules shall govern as to all civil suits with exceptions not applicable here. Those rules were adopted by the Supreme Court under the provisions of 28 U. S. C. 2072 (App. pp. 10-11) which specifically provides in the second paragraph that they "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution".

F. R. C. P. 2 (App. p. 4) provides that there shall be only one form of action, a "civil action", which encompasses both actions at law and at equity.

F. R. C. P. 13 (App. pp. 4-6) provides at 13(a) that a party "shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Here the subject matter of the counterclaim and the complaint was identical.

It cannot be contended that the petitioners-defendants intentionally waived their right to a trial by jury as to issues arising from the complaint and answer by virtue of having filed a counterclaim in view of F. R. C. P. 13 which makes it compulsory that any claim arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third par-

ties of whom the court cannot acquire jurisdiction" must be pleaded. Petitioners-defendants had no election. They were compelled to file their counterclaim and, being compelled, it cannot be said they elected to waive trial by jury.

The disenting opinion in the *Beacon Theatres* case recognized this and in the following words:

> ". . . since Beacon's counterclaim was compulsory under the Rules, see Rule 13(a), it is apparent that by filing it Beacon could not be held to have waived its jury rights." (359 U. S. 500, 519; 79 S. Ct. 948, 961.)

F. R. C. P. 38 (App. pp. 8-9) provides at (a) that the right of trial by jury "as declared by the Seventh Amendment to the Constitution (App. p. 1) or as given by a statute of the United States shall be preserved to the parties inviolate" and at (b) the demand for a jury trial may be made "not later than 10 days after the service of the last pleading directed to such issue" and "may be indorsed upon a pleading". Here the demand was indorsed upon the answer and counterclaim when filed.

F. R. C. P. 39 (App. p. 9) provides at (a) that when a jury trial has been demanded, the trial of all issues so demanded "shall be by jury" unless (1) the parties stipulate or agree in open court to a court trial, or (2) that the court upon motion or upon its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

The right of a litigant in a federal court to trial by jury unless waived by the party was recognized in

Scott v. Neely (S. Ct. 1890), 140 U. S. 106, 11 S. Ct. 714, 35 L. Ed. 358.

In the present case there was no stipulation, no agreement in open court, and the court made no finding that the issues of the complaint and answer were not suitable for a jury trial.

In the present case the complaint and answer, on the one hand, and the counterclaim and reply, on the other, raised identical issues of patent infringement and patent validity. The complaint sought a declaratory judgment under 28 U. S. C. 1338(a), 2201 (App. pp. 10, 11) but as stated by this Court in the *Beacon Theatres* case the Declaratory Judgment Act "specifically preserves the right to a jury trial to both parties". F. R. C. P. 57 specifically so states (App. pp. 9-10).

Just what were the "imperative circumstances" (a requirement laid down by this Court in the *Beacon Theatres* case, 359 U. S. 500, 510, 511, 79 S. Ct. 948, 957) which existed in the present case?

Those "imperative circumstances" comprised the fact that the counterclaim sought an accounting and an injunction in the event of a decision favorable to the defendants upon the identical issues raised by the complaint and answer.

Those "imperative circumstances" fell far short of being "imperative" particularly in view of the fact that defendants sought leave to file an amended counterclaim which eliminated entirely all request for equitable relief but were denied that leave by the District Court solely to buttress the denial of the right to a jury trial and in the face of the complete lack or irreparable harm and injury which alone justifies equitable relief

in the Federal Courts (see *Beacon Theatres* case, 359 U. S. 500, 506, 507, 79 S. Ct. 948, 957).

But even accepting the unwarranted denial of the leave to file an amended counterclaim and considering the posture of the case as though no amended counterclaim had ever been proposed, there are no imperative circumstances. This Court said in *Beacon Theatres:*

> ". . . whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict."

The Issues of Validity and of Infringement Are Jury Issues.

A "jury issue" is defined as an issue suitable for trial by jury. Traditionally the role of the jury has been to find the facts.

In *Graver Mfg. Co. v. Linde,* 336 U. S. 271, 275 (1946), this Court said:

> ". . . We are now asked to hold that there has been no such inv tion.
>
> "Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which the trial court may be enlightened by scientific demonstrations."

Certainly it cannot be denied that the question of validity or invention inherently involves questions of fact.

This Court's decisions in the patent field early laid down the judicial approach to the jury function in patent cases. In *Battin v. Taggert*, 17 How. 74, 85, 15 L. Ed. 37, 41 (1854), the trial court had directed a verdict for the alleged infringer on the basis of patent invalidity. Reversing, this Court stated:

> "This . . . took from the jury, facts which it was their province to examine and determine. It was the right of the jury to determine from the facts in the case whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described. This the statute required, and of this the jury are to judge.
>
> "The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury, such as the identity of the machine used by the defendant with that of the plaintiff or whether they have been constructed and act on the same principle."

In similar vein, and parallel to the instant case, is *Keyes v. Grant*, 118 U. S. 25, 30, 30 L. Ed. 54, 58 (1886), where in an action for infringement of an improvement in furnaces for smelting, the defense claimed anticipation by a machine described in an earlier publication. There were differences in the machines

and their arrangements and experts disagreed as to whether these differences were material to the result and whether any improvement in plaintiff's machine was the result of invention. Reversing a directed verdict for defendant, this Court held that:

> "Clearly it was not a matter of law that the specifications of the plaintiff's patent, and the publication of Karsten, taken in connection with the drawings, . . . described the same thing . . . this was a question of fact properly to be left for determination to the jury, under suitable instructions. . . ."

So too in *Bishoff v. Wethered*, 76 U. S. 812, 19 L. Ed. 829 (1869), the Court held that the trial court could not instruct the jury as a matter of law that the specifications of a patent in issue compared with those of an alleged prior art patent, but that whether or not they did compare was a matter to be determined by the jury on all the evidence. To the same effect see *Turril v. Michigan Sout. rn & N. I. R. Co.*, 68 U. S. 491, 17 L. Ed. 668 (1863). So too in *Thompson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 445, 68 L. Ed. 1098 (1924), the Court held that the question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is one of fact, and in an action at law for infringement is to be left to the determination of the jury.

Earlier lower court decisions are to the same effect.

In *Hunt Bros. Fruit Packing Co. v. Cassidy*, 53 Fed. 257 (C. A. 3, 1892), the court held that whether there was infringement of a patent for fruit dryers and whether the use of a particular device therein was

known at the time of plaintiff's application, were questions of fact to be left to the jury. In *Carver v. Braintree Mfg. Co.*, Fed. Case No. 2,485, 2 Story 432 (C. C. Mass. 1843), the court held that objections that a patent invention is old, or that the original and the renewed patent are not for the same invention or that either were obtained with a fraudulent intent, all involve matters of fact, and are for the jury to decide. To the same effect see *Poppenhusen v. Falke*, Fed. Case No. 11,279 (C. C. N. Y., 1861), holding that whether a reissued patent is for the same invention as the original, is a question of fact for the jury. See also *Foote v. Selsby*, Fed. Case No. 4,916 (C. C. N. Y., 1849), aff'd 55 U. S. 218; *Washburn v. Gould*, Fed. Case No. 17,214, 3 Story 122 (C. C. Mass., 1844).

The following cases have held the question of validity is a question of fact or involves questions of fact:

First Circuit—*Lincoln Stones Inc. v. Nashua Mfg. Co.* (1946), 157 F. 2d 154.

Second Circuit—*Schering Corp. v. Gilbert* (1946), 153 F. 2d 428.

Third Circuit—*Zephyr American Corp. v. Bates Mfg. Co.* (1942), 128 F. 2d 380;

Cusano v. Kotler (1947), 159 F. 2d 159;

Galion v. Budd Mfg. (1948), 169 F. 2d 72;

Sutherland Paper v. Grant Paper (1950), 183 F. 2d 926.

Sixth Circuit—*O'Leary v. Liggett Drug* (1945), 150 F. 2d 656;

Rector Dickinson v. R. P. Scherer (1954), 211 F. 2d 835.

Seventh Circuit—*Baric v. Superior Tanning Co.* (1950), 182 F. 2d 724;

Associated Plastics v. Gits Molding (1950), 182 F. 2d 1000;

Texas Oil Co. v. Globe Oil Refining Co. (1955), 225 F. 2d 725.

Eighth Circuit—*Hall Laboratories v. Economics Laboratory Inc.* (1948), 169 F. 2d 65;

Trico v. Delman Corp. (1950), 180 F. 2d 529;

Willis v. Town (1950), 182 F. 2d 892.

Ninth Circuit—*Brodie Co. v. Hydraulic Press* (1945), 151 F. 2d 91;

Crowell v. Baker Oil Tools Inc. (1946), 153 F. 2d 972;

Maulsky v. Cozenroy (1947), 161 F. 2d 165;

Faulkner v. Gibbs (1948), 170 F. 2d 34.

In *United States v. Esnault-Pelterie* this Court said:

"Validity and infringement are ultimate facts on which depends the question of liability. In actions at law they are to be decided by the jury."

United States v. Esnault-Pelterie (1936), 299 U. S. 201, 81 L. Ed. 123;

Royer v. Belting Co. (1890), 135 U. S. 319, 34 L. Ed. 214;

Trustees of Masonic Fund v. Fountain Elect. etc. Corp. (C. A. 2, 1914), 218 Fed. 642.

The Decision of the Court of Appeals Does Not Follow the Law of the Beacon Theatres Case.

The decision of the Supreme Court in the *Beacon Theatres* case clearly established the overriding importance of the constitutional guarantee of a jury trial as provided by the Seventh Amendment. There is no constitutional guarantee of a court trial. The law as laid down in the *Beacon Theatres* case is believed to be controlling in the present case. It was so recognized in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corporation, et al.* (C. A. 5, decided September 15, 1961), 294 F. 2d 486, 131 U. S. P. Q. 1, hereinafter discussed.

In *Beacon Theatres* a mandamus proceeding was brought to require the Hon. Judge Harry C. Westover of the same court from which the present case arises to vacate certain orders depriving the petitioner of a jury trial. The Court of Appeals for the Ninth Circuit refused the writ and petitioner sought certiorari. The Supreme Court reversed the Court of Appeals and held that the writ of mandamus should have been issued.

Fox West Coast Theatres brought a declaratory judgment action against Beacon Theatres, Inc. Fox had entered into a contract with moving picture distributors giving to Fox the exclusive right to show "first run" pictures in its area, and providing that a "clearance", a time period, should take place between Fox's showing of first run pictures and the next showing. Beacon notified Fox that it considered the contract to be in violation of the antitrust laws.

Fox thereupon filed its complaint seeking declaratory relief and a ruling that the contract was rea-

sonable and not violative of the antitrust laws. The complaint also sought an injunction to prevent Beacon from instituting any antitrust suits against Fox or its distributors.

Beacon filed an answer and a counterclaim against Fox, and also a cross-claim against the distributor of Fox who had intervened. These pleadings denied the threat to Fox, placed the complaint in issue, and asked for treble damages.

Beacon demanded a jury trial.

The district court viewed the issues raised by the complaint as essentially equitable and directed that the other issues be tried by the court before the jury determination of the validity of the charges of antitrust violation made in the counterclaim and cross-claim.

A common issue of the complaint, the counterclaim, and the cross-complaint was the reasonableness of the "clearances" granted Fox, and this reasonableness depended, in part, upon the presence or absence of competition between the two parties.

The Supreme Court stated that the result of the action of the district court was to "limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit".

In reversing the Court of Appeals and ruling that the order of the district court was error, the Supreme Court said:

> "'In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency'."

There are distinctions between the facts in the *Beacon Theatres* case and in the present case. Those differences, where present, give small support of any contention that petitioners are not guaranteed a jury trial by the Constitution in the present case if one was insured in the *Beacon Theatres* case.

The differences and similarities between and in the *Beacon Theatres* case and the present case recognized to be of any significance are here referred to:

1. In the *Beacon Theatres* case and in the present case the complaint sought declaratory relief.

2. In the *Beacon Theatres* case and in the present case the defendant filed a counterclaim asking for treble damages.

3. In the *Beacon Theatres* case and in the present case the defendant asked for a jury trial.

4. In the *Beacon Theatres* case the original complaint asked for equitable relief. In the present case no equitable issues were raised by the complaint and answer.

5. In the *Beacon Theatres* case the district court directed a court trial of all issues of a complaint which had asked for equitable relief. In the present case the district court directed a court trial of all issues of a complaint which asked only for legal relief.

6. In the *Beacon Theatres* case the district court directed a later jury trial of the issue as to treble damages raised by the counterclaim and cross-claim. In the present case the court held that the presence of equitable issues in the counter-

claim should result in a single court trial of the legal issues in the complaint and answer as well as the equitable issues of the counterclaim.

The Supreme Court did not decide the *Beacon Theatres* case upon the basis of a limited or narrow set of facts but instead upon broad principles fully applicable to the present case. This is clearly reflected in the following:

". . . We granted certiorari, 356 U. S. 950, 78 S. Ct. 990, 2 L. Ed. 2d 1064, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' Dimick v. Schiedt, 293 U. S. 474, 486, 55 S. Ct. 296, 301, 79 L. Ed. 603.

* * *

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.

". . . Under the Federal Rules the same court may try both legal and equitable causes in the same action. . . . Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict.

". . . Since in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies the Federal Rules necessarily affects the scope of the Federal Rules necessarily affects to scope of equity. . . . This is not only in accord with the

spirit of the Rules and the Act but is required by the provision in the Rules that 'the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved . . . inviolate.'

"If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in Scott v. Neely, 140 U. S. 106, 109-110, 11 S. Ct. 712, 714, 35 L. Ed. 358: 'In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.'"

In the instant case the right to trial by jury has not been protected nor has it been denied because of "imperative circumstances." It has been denied solely because the district court prefers to avoid a jury trial in a patent suit. Such a holding clearly is *contra* to Beacon Theatres.

The Decision of the Court of Appeals Conflicts With the Thermo-Stitch Case of the Fifth Circuit.

The decision of the Ninth Circuit Court of Appeals in the present case is in conflict with the decision of the Fifth Circuit Court of Appeals upon the question of the right to trial by jury of the issues of patent validity and infringement when raised by a complaint for declaratory judgment. The latter Court in a recent case supports petitioners' position with respect to the *Beacon Theatres* case. That case is *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corporation et al.* (C. A. 5, decided September 15, 1961), 294 F. 2d 480, 131 U. S. P. Q. 1. The facts of that case are very close to the present case.

Chemi-Cord sought declaratory judgment of patent invalidity and noninfringement and an injunction restraining the defendants from suing the plaintiffs and their customers. Defendant Thermo-Stitch counterclaimed for damages, patent infringement, fraud, and violation of the antitrust laws. Thermo-Stitch demanded a jury trial. Chemi-Cord, upon the ground the complaint sought equitable relief, moved (1) for a separate trial upon the issues of validity and infringement, and (2) to strike defendant's motion for a jury trial on those issues. The District Court granted the motion. The Court of Appeals for the Fifth Circuit reversed upon the authority of Beacon Theatres, saying:

> "Before Beacon Theatres was decided, the law was unclear but usually the determinative test on the point at issue was the 'basic' equitable character of the relief sought.
>
> "* * * the reasoning of the Beacon Theatres decision, however, clearly applies to this case. To

interpret it in such a way that it should not control this case would be to ignore the express statement of the opinion that the decision was not based on the limited nature of the equitable claim involved.

"Beacon Theatres holds that where the presence of legal and equitable causes in the same case requires the selection between a jury and a non-jury determination of certain common issues, the discretion of the trial court is 'very narrowly limited and must, wherever possible be exercised to preserve jury trial.'"

In the *Thermo-Stitch* case, as here, the complaint seeking declaratory relief raised the issues of patent validity and infringement. In *Thermo-Stitch* the complaint also sought an injunction which was not sought by the complaint in the instant case. There is the additional distinction that in the present case the counterclaim seeks equitable relief which was not true in the *Thermo-Stitch* case.

The two cases have in common the questions of validity and infringement raised by the complaint and by the counterclaim and the demand for a jury trial with respect thereto.

In the *Thermo-Stitch* case it was held that the counterclaimant had the right to a jury trial, having demanded one. In the instant case this right was denied.

The law of *Beacon Theatres* was held to be controlling by the Fifth Circuit Court of Appeals but though urged was ignored by the Court of Appeals for the Ninth Circuit.

It is urged that here is an important question relating to the right to a jury trial upon which the two circuits are in disagreement and which disagreement should be resolved by this Court.

The District Court Violated Judicial Discretion and Deprive Petitioners of Due Process of Law.

The District Court violated judicial discretion and deprived petitioners of due process of law by (1) refusing to grant leave to file an amended counterclaim which eliminated prayers for equitable relief in the absence of irreparable harm and the presence of adequate legal remedy, and (2) using the presence of those prayers for equitable relief to justify the striking of a demand for jury trial.

The ruling (Pet. for Mandamus, Appx. p. 50) violated the clear principle of F. R. C. P. 15 which provides:

> ". . . leave shall be freely given when justice so requires."

It also violated the law as stated by this Court in the *Beacon Theatres* case to the effect:

> "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."

As viewed by the District Court, and with the approval of the Court of Appeals, a litigant can be forced to continue to seek equitable relief although the circumstances of the case do not justify it, and although he does not want it, if that continuance will strengthen the denial of a jury trial. In effect, this comprises a variation of the law and of the rules to enable the district court to buttress its denial of a jury trial.

Shubins found during discovery they did not need either an accounting or an injunction, yet the counterclaim on file sought both. To insist that petitioners

defendants continue to seek injunctive relief and an accounting when there is nothing to account for and nothing to enjoin does violence to the principles forming the very basis of injunctive relief in the federal courts which has always been irreparable harm and inadequacy of legal remedies.

Beacon Theatres, Inc. v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988;

State of Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 561, 14 L. Ed. 249;

Parker v. Winnipiscogee Lake Cotton & Woollen Co., 2 Black 545, 551, 17 L. Ed. 333;

Enelow v. New York Life Ins. Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440.

The right of the court to exercise judicial discretion cannot be contested, but where that right is exercised solely for the purpose of reinforcing the denial of a right to a jury trial, and not for any reason relating to the merits of the case, or to the presence or absence of any actual need of equitable relief, judicial discretion is violated.

Petitioners would clearly be entitled to a jury trial in the absence of prayers for equitable relief in the counterclaim. The proposed amended counterclaim (Pet. for Mandamus, Appx. pp. 36-38) which petitioners moved for leave to file contains no such prayers.

Petitioners have asserted *supra* and maintain, that they are entitled to a jury trial with the original filed counterclaim as their pleading. They further assert here that if they are in error in that position they would have been entitled to a jury trial had the pro-

posed counterclaim (Pet. for Mandamus, Appx. p. 30) been filed and that the refusal of the District Court to grant leave to file the proposed amended counterclaim for the reason stated resulted in depriving petitioners of the jury trial to which they were entitled and so deprived them of due process of law.

Conclusions.

1. The District Court granted Bowles' motion to strike the Shubin demand for a jury trial from the filed answer and counterclaim.

2. The District Court denied Shubins' motion for leave to file a proposed amended counterclaim, which therefore was never filed.

3. The Bowles' complaint and the Shubin answer as filed raised jury issues.

4. Shubins petitioned for mandamus to vacate the District Court order effectively denying them a jury trial on the issues of the filed complaint and answer believing they were entitled thereto under the law of the *Beacon Theatres* case and is interpreted by the Court of Appeals in the Fifth Circuit in the *Thermo-Stitch* case.

5. The Court of Appeals of the Ninth Circuit refused to vacate the order of the District Court denying the Shubins a jury trial, the order being in conflict with the law of the *Thermo-Stitch* case in the Fifth Circuit.

6. The conflict in the interpretation of the law relative to a patentee's right to a jury trial in the Fifth and Ninth Circuits is important, has not been, and should be decided.

7. The District Court deprived the Shubins of due process of law by insisting that they continue to seek equitable relief by denying their motion to file an amended counterclaim omitting all reference to equitable relief for which it had been found there was no need, the District Court's sole reason for denying leave to amend being to buttress its denial of the Shubin right to trial by jury.

The granting of this petition for certiorari is believed to be proper and such action is earnestly solicited.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,
Attorney for Petitioners.

APPENDIX.

Constitution of the United States, Seventh Amendment.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Order of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John M. Shubin and Peter S. Shubin, Petitioners, vs. The United States District Court for the Southern District of California, Central Division, Respondent, and S. Vincen Bowles, Inc., Respondent. No. 17,590.

Filed Dec. 29, 1961.

In the Matter of the Petition for Writ of Mandamus and for Other Relief.

Before: Barnes, Hamlin and Jertberg, Circuit Judges.

Before us is a petition for mandamus to require the district court to grant petitioners a jury trial on certain issues raised by a *proposed* amended counterclaim.

The original complaint below sought declaratory relief as to whether the then defendants' (here petitioners Shubin) patent was valid; and denied infringement by plaintiff. The original answer and counterclaim sought

an injunction and an accounting, and demanded a jury. After plaintiff below sought leave to strike the defendants' demand for a jury trial, upon the ground only equitable issues were involved, defendants below sought to amend their counterclaim to eliminate all need for equitable relief, and to allege damages, and thus create a factual question.

It should be mentioned that discovery proceedings below indicated the prelitigation notice of patent and charge of infringement had so closely antedated the filing of the suit that both parties had agreed that no infringement had taken place—hence no necessity for the equitable relief prayed for in the original answer and counterclaim.

A partial transcript of the proceedings below is before us on this motion. It indicates the trial judge recognized that patent suits do not lend themselves readily to trial by jury for obvious reasons, yet if the defendants below and petitioners here were entitled under the law to a jury trial, he could not, and would not, deny their request.

Inferring that the only purpose of the proposed amended counterclaim was to create a factual issue in the case not then existing, the trial judge denied petitioners the right to amend. He then granted the motion to strike the demand for a jury trial upon the ground only equitable issues were involved.

When this action took place, petitioners had no legal right in the then posture of the case to amend their

pleading without permission of the court. Such permission should be freely granted. Yet here it was not, for reasons sufficient to an experienced trial judge. Such an amendment, a matter of course before a responsible pleading is served, is not a matter of course or right after a responsive pleading is served.[1] We find no abuse of discretion in either of the court's rulings.

The petition for a writ of mandamus or other relief is denied.

(Endorsed) Order Filed Dec. 29, 1961.

Frank H. Schmid, Clerk.

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[1]"Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS.

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . ." (Fed. R. Civ. P. 15(a), 28 U.S.C.)

"Rule 7. PLEADINGS ALLOWED; FORMS OF MOTIONS.

"(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; . . . ." (Fed. R. Civ. P. 7(a), 28 U.S.C.)

Petitioners did not move in the district court for leave to file an amended counterclaim (Tr. 35-41) until after respondent had filed a reply to the original counterclaim (Tr. 15-22).

Federal Rules of Civil Procedure.

Rule 1. Scope of Rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. One Form of Action.

There shall be one form of action to be known as "civil action".

Rule 13. Counterclaim and Cross-Claim.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the

recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsible pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after

service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems

it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 18. Joinder of Claims and Remedies.

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 38. Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not

later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Rule 57. Declaratory Judgments.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., § 2201, shall be in ac-

cordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

28 U. S. C. 1338(a). Patents, copyrights, trade-marks, and unfair competition.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

28 U. S. C. 1651 (a). Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U. S. C. 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, §103, 63 Stat. 104; July 18, 1949, c. 343, §2, 63 Stat. 446; May 10, 1950, c. 174, §2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, §12(m), 72 Stat. 348.

28 U. S. C. 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, §12(p), 72 Stat. 349.

35 U. S. C. 281. Remedy for infringement of patent.

A patentee shall have remedy by civil action for infringement of his patent. July 19, 1952, c. 950, §1, 66 Stat. 812.

[Title of District Court and Cause]

Answer and Counterclaim for Patent Infringement.

(Jury Trial Demanded)

Come now the defendants John M. Shubin and Peter S. Shubin, individuals, and answer the Complaint as follows:

I

Defendants admit the allegations of paragraphs 1, 2, 3, 4, and 5.

II

Defendants admit they have charged the plaintiff with infringement of Letters Patent 2,961,105, that plaintiff has denied infringement, that an actual controversy exists, that plaintiff is entitled to a declaration of its rights, all as alleged in paragraph 6; deny each and every other allegation contained in said paragraph including its parts (a), (b), (c), (d), (e), (f), (g), (h), and (i) and each of their sub-parts.

III

Defendants deny each and every allegation contained in paragraph 7.

WHEREFORE, defendants and counterclaimants pray as follows:

AS TO THE COMPLAINT
FOR DECLARATORY JUDGMENT

1. That said complaint be dismissed.

2. That defendants be awarded their costs and reasonable attorney's fees.

Dated this 20th day of February, 1961.

/s/ W. D. Sellers
W. D. Sellers
Attorney for Defendants
and Counterclaimants
16 North Marengo Avenue
Pasadena, California

[Title of District Court and Cause]

Answer and First Amended Counterclaim for Patent Infringement.

(Jury Trial Demanded)

Come now the defendants John M. Shubin and Peter S. Shubin, individuals, and answer the Complaint as follows:

I

Defendants admit the allegations of paragraphs 1, 2, 3, 4, and 5.

II

Defendants admit they have charged the plaintiff with infringement of Letters Patent 2,961,105, that plaintiff has denied infringement, that an actual controversy exists, that plaintiff is entitled to a declaration of its rights, all as alleged in paragraph 6; deny each and every other allegation contained in said paragraph including its parts (a), (b), (c), (d), (e), (f), (g), (h), and (i) and each of their sub-parts.

III

Defendants deny each and every allegation contained in paragraph 7.

WHEREFORE, defendants and counterclaimants pray as follows:

AS TO THE COMPLAINT
FOR DECLARATORY JUDGMENT

1. That said complaint be dismissed.

2. That defendants be awarded their costs and reasonable attorney's fees.

Dated this 6th day of September, 1961.

/s/ Wm. Douglas Sellers
W. D. Sellers
Attorney for Defendants
and Counterclaimants
16 North Marengo Avenue
Pasadena, California